UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LAURA WOODS,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-CV-37-B-C
	)	
BERRY, FOWLES & CO.,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Berry, Fowles & Co. moves for summary judgment on the ground that plaintiff's state law claims, Counts I, II, IV, V, and VI are preempted by ERISA § 1144(a) and in the alternative, that plaintiff has failed to present admissible evidence to satisfy the elements of the state law claims. (Docket No. 15.) Defendant also moves for summary judgment on Count III, the ERISA claim, arguing that plaintiff is not entitled to death benefits under the plan administered by Berry, Fowles & Co.. (Docket No. 15.) I recommend that the Court **GRANT** defendant's motion for summary judgment as to Counts I, II, IV, V, and VI as preempted by ERISA and **DENY** defendant's motion for summary judgment as to Count III.

Summary Judgment Standard

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter at law." Fed. R. Civ. P. 56(c). A fact is "material" when it has the "potential to affect the outcome of the suit under the applicable law." Nereida-Gonzalez v. Tirado-

Delgado, 990 F.2d 701, 703 (1st Cir. 1993) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). A "genuine issue" exists when the evidence is "sufficient to support rational resolution of the point in favor of either party." Id. Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts

Plaintiff (hereinafter "Mrs. Woods") brings this action to claim a death benefit under life insurance allegedly promised to her deceased husband by his employer, Berry, Fowles & Co.. Defendant, Berry, Fowles & Co. is an accounting firm, organized as a corporation with a principle place of business in Maine and owned by George Howard, Mike Royer, and Donald Talbot. (Def.'s Statement of Material Facts (DSMF) ¶ 1; Pl.'s Resp. Def.'s Statement of Material Facts (PRSMF) ¶ 55.)

Sometime prior to September 1, 1998, Howard, the director and treasurer of Berry, Fowles & Co., interviewed Michael Woods ("Woods") for a full-time staff accountant position. (DSMF ¶ 4.) Although Howard does not recall specific questions or discussion with Woods, he does remember the conversation occurring. (PRSMF ¶¶ 40, 41; Def.'s Reply to Pl.'s Additional Statement of Material Facts (DRSMF) ¶ 41.) During the interview, Howard informed Woods of the salary, the medical insurance, the vacation and holiday pay and the life insurance. (PRSMF ¶ 47; DSMF ¶5.) Howard described to Woods the same benefits available to the other staff accountants at Berry, Fowles & Co. and described the standard life insurance coverage as three times the annual salary. (PRSMF ¶ 41.)

At some point after the interview, Woods returned to the car where Mrs. Woods had been waiting for him. (PRSMF ¶ 46.) Once in the car, Woods told his wife, "they offered me the job and the benefits are [sic] they pay eighty-five percent of a family policy for health insurance, I would pay fifteen, and they offer life insurance of triple your salary, and paid vacation one week in the first year – or for the first year with incremental increases in that [sic] with longevity, and that there were paid holidays and he did not know just which ones." (Id.) Woods further stated that he did not have to do anything as the benefits began on the first day of employment. (Id. ¶ 48.) Woods either was not informed or did not mention to his wife that he had to complete an application and be approved for the life insurance and that the life insurance was confined to one provider. (Id. ¶¶ 15, 48.) The life insurance was an incentive to the Woods because they were nearly fifty-years old, they had a family and felt they needed more life insurance. (Id. ¶ 49.) The day after his interview, Woods accepted the position at Berry, Fowles & Co. as a full-time staff accountant effective September 1, 1998. (Id. ¶ 48; DSMF ¶ 2.)

On September 11, 1998, Woods wrote a Memo of Understanding at Howard's request outlining his understanding of the terms of employment. (DSMF ¶ 4.) Howard requested such memos in order to discover any misunderstanding at the beginning of employment. (PRSMF ¶ 43.) In his Memo, Woods noted his salary, but did not mention any of the benefits offered to him. (DSMF ¶ 4, Ex. B1.) The memo is not considered to be a complete recitation of the terms of Woods' employment. (PRSMF ¶ 4.)

At the time Woods was hired and throughout his employment, Berry, Fowles & Co. participated in a group insurance plan titled the American Institute of Certified Public Accountants Insurance Trust ("the AICPA plan") which was provided through the

American Institute of Certified Public Accountants ("AICPA"). (DSMF ¶¶ 8, 11.) The AICPA plan required employees to have six-months continuous service with Berry, Fowles & Co. and have an application approved by Prudential. (DSMF ¶ 24; PRSMF ¶ 24.) The application required employees to submit evidence of insurability. (DSMF ¶ 15.) The condition of insurability is provided in the Administration Manual and on the application. (DRSMF ¶ 41.) Berry, Fowles & Co. did not create its own written document to describe the life insurance it offered. (PRSMF ¶ 41.)

AICPA supplied an administration manual to assist employers in managing the AICPA plan. (DSMF ¶ 13.) The company designated the Office Manger, Roland Paquin, to administer the AICPA plan. (Id. ¶ 21.) The AICPA plan required Paquin to prepare monthly or quarterly reports. (Id. ¶¶ 19, 21, 23.) The AICPA plan expected Berry, Folwes & Co. to calculate the premiums it owed and report the addition or termination of employees. (Id. ¶ 19.) The company was responsible for paying the entire premium amount. (Id. ¶ 6.) Paquin's duties as Office Manager included the responsibility of submitting employee's applications for approval. (Id. ¶¶ 23, 52.) The Administrative Plan manual states that the employer should complete the section labeled "To be Completed by Firm" and should "instruct the eligible individual on how to complete the form... ." (PRSMF ¶ 18.) The Summary Plan Description states that Prudential pays the benefits under the plan and makes claim decisions. (Id. ¶ 17.) Berry, Fowles & Co. had no responsibility for accepting claims, making determinations on claims, or paying death benefits under the plan. (DRSMF ¶ 17.)

In November 1998, Paquin, who at the time was employed as a staff accountant for defendant, became the Office Manager. During June and September of the following

year, 1999, Paquin researched insurance providers other than AICPA, although Berry, Fowles & Co. had exclusively participated with AICPA during the past ten years. (PRSMF ¶ 56; DRSMF ¶¶ 56, 58, 61.) With the assistance of David Hamilton, an insurance agent, Paquin obtained a quote from UNUM on an insurance package and provided it to Howard sometime after September 1999. (PRSMF ¶ 59; DRSMF ¶ 59.) Berry, Fowles & Co. did not take any action at that time. (PRSMF ¶ 59.) The company continued to participate in the group life insurance plan with AICPA. (DSMF ¶ 9.)

During September of 1999, almost one year after assuming the position of Office Manager, Paquin realized he had not received any information relating to his own life insurance plan with Berry, Fowles & Co.. (PRSMF ¶ 52.) After checking into the matter, Paquin discovered he was not covered because an application for insurance had not been submitted to AICPA for approval. (Id.) He learned that the plan was self-administering, meaning that Berry, Fowles & Co. was to submit applications for new employees. (Id. ¶ 53.) As Paquin was responsible for making sure that applicants received their application forms (Id. ¶ 52, Ex. C at 38), he promptly circulated the applications to all employees hired during the past year, including Woods. (DSMF ¶ 26; PRSMF ¶ 53.) Paquin informed Howard of the "problems" with filing the applications and of the gap in coverage for these employees. (PRSMF § 53.) Due to the delay in receiving an application, Woods did not submit his application until September 1999, a year after he was hired. (Id.; DSMF ¶¶ 26, 27.)

It appears that prior to September 1999, Paquin was not aware that the AICPA plan required submittal of an application by employees or approval by Prudential. (PRSMF ¶¶ 42, 43.) Paquin states that when he was hired in June of 1998, Howard

explained that the life insurance coverage began after six months of service and amounted to three times his salary, but Howard did not mention or imply that the insurance was contingent on approval. (Id. ¶ 42.) Additionally, Paquin states that in December of 1998, when he was asked by Howard to write letters of understanding for potential employees, he did not write that the life insurance was contingent on approval or limited to one carrier. (Id. ¶ 45; DRSMF ¶ 45.)

The AICPA application submitted by Woods and all the other full-time employees was called a "Request for Coverage Form" and was titled as such across the top of the form. The application contained an "Important Notice" that informed Woods that "the insurance is to become effective only upon acceptance by the underwriting company." (DSMF ¶ 29.) By signing the document, Woods, in part, declared the following:

> I declare that to the best of my knowledge and belief all of the above answers and those shown on the reverse side to the questions are complete and true. I agree that (1) the insurance applied for is subject to the policy terms and shall become effective on the date or dates established by the policy, provided the evidence of insurability is satisfactory, (2) this form supercedes any prior form I may have completed with respect to the insurance being applied for.

(DSMF 28; Ex. 7.)(emphasis added.)

By letter dated October 22, 1999, Paquin and Woods were informed that Woods was denied coverage. (DSMF ¶ 32; PRSMF ¶ 54.) Paquin was surprised, as this was the first denial he had encountered. (PRSMF ¶ 54.) Paquin verified with Woods that he received the denial letter and informed Howard of the situation. (Id. ¶¶ 54, 55.) Shortly thereafter, Paquin discussed the delay and denial of Woods' application with all three owners of Berry, Fowles & Co.. (Id. ¶ 55.) After two other employees were denied by

Prudential, the lack of coverage was raised and discussed in another staff meeting.[1] (Id. ¶ 56.) At some point, Paquin had conversations with Hamilton, the insurance agent, who stated there were other coverage options, the denials were not a problem and other arrangements could be made. (Id. ¶ 57.)

Woods did not mention the denial of coverage to his wife, but did mention it to his son, Norman Woods, sometime between October 22, 1999 and March 24, 2000. (Id. ¶ 64; DRSMF ¶ 64.) According to Norman Woods his father said that his first application for life insurance had been rejected, but that the office manager at Berry, Fowles & Co. assured him that alternate coverage would be found for him and he should not worry about it. (PRSMF ¶ 64.) Woods informed his son that Howard was a good man and would make sure "this was taken care of." (Id.)

Berry, Fowles & Co. disputes that alternate insurance coverage was sought, promised or obtained for any employee who was denied coverage under the AICPA plan. (DSMF ¶¶ 31, 36.) Howard testifies that when he interviewed Woods, he explained that the insurance coverage was through AICPA and was subject to approval by Prudential (Id. ¶ 7), and that Berry, Fowles & Co. would pay the premium if Woods qualified for coverage. (Id. ¶ 6.) Paquin testifies that he did not make any promise to Woods that Berry, Fowles & Co. would seek or obtain alternative insurance coverage for him and states that he did not have authority to make such a promise. (Id. ¶¶ 34, 35; PRSMF ¶¶ 34, 35.) Hamilton states that when Paquin spoke with him regarding denied coverage, Paquin never indicated that Berry, Fowles & Co. was interested in obtaining group or individual policies for denied employees. (DRSMF ¶ 57.) It is undisputed that Paquin

[1] Overall, there were four employees besides Woods who were denied coverage under the AICPA plan. (DSMF ¶ 36.) It is not clear whether any of these denials occurred prior to Woods' denial.

did not have the authority to promise Woods that Berry, Fowles & Co. would seek alternate life insurance coverage. (DSMF ¶ 35; PRSMF ¶ 35.)

On March 24, 2000, Woods died. (DSMF ¶ 38.) When Mrs. Woods went to Berry, Fowles & Co. to pick up Woods' personal belongings, she learned that a life insurance policy for Woods did not exist through the employer. (PRSMF ¶ 62.) She brought this action on February 28, 2001, as Woods' beneficiary and the personal representative of his estate. (Compl. ¶ 1; DSMF ¶ 1.) She asserts five state law claims: breach of contract (Count I), negligence (Count II), a third-party beneficiary claim (Count IV), negligent misrepresentation (Count V), and promissory estoppel (Count IV). Mrs. Woods also asserts a claim pursuant to ERISA (Count III) which alleges that by failing to provide the life insurance promised to Woods, Berry, Fowles & Co. violated the AICPA plan. Mrs. Woods was not aware of any other time Woods was denied life insurance. In 1986, Prudential approved Woods for life insurance through a different employer. (PRSMF ¶ 50; DRSMF ¶ 50.)

At some point, although it is unclear when, Berry, Fowles & Co. did begin a general review of its benefit package. (PRSMF ¶ 58; DRSMF ¶ 58). In July 2000, defendants ceased participating with AICPA and switched to UNUM. (PRSMF ¶ 61; DRSMF ¶ 61.) Although the UNUM plan offers a lesser life insurance coverage, it provides a disability benefit not previously available at Berry, Fowles & Co., it begins immediately, and is neither contingent on insurability nor self-administering. (DRSMF ¶ 61.) Nonetheless, during Woods' employment, the AICPA plan was the only plan Berry, Fowles & Co. had in place and was the only means by which it provided its employees with life insurance coverage. (DSMF ¶¶ 8, 12.)

Discussion

Berry, Fowles & Co. moves for summary judgment asserting that ERISA §1144(a) preempts the state law claims in Counts I, II, IV, V, and VI and in the alternative, there is insufficient admissible evidence to satisfy the elements of these claims. (Docket No. 15.) Defendant moves for summary judgment on Count III, the ERISA claim, on the ground that Mrs. Woods is not entitled to benefits under the plan administered by Berry, Fowles & Co.. (Id.)

1. Did Defendant Offer a General Life Insurance Benefit or Coverage Under the AICPA Plan?

Before a determination can be made regarding the motion for summary judgment on the state law claims, I must determine whether there is sufficient credible evidence to support a factfinder's reasonable inference that Berry, Fowles & Co. offered Woods a generic life insurance benefit of three times his salary rather than specific life insurance coverage under the AICPA plan. Both sides agree that during Woods' interview, Howard offered him the same insurance offered to all full-time employees at the company. (PRSMF ¶ 41; DRSMF ¶ 41.). This coverage provided a death benefit of three times an employee's salary. (Id.) The parties dispute that Howard informed Woods that the life insurance was specifically provided through AICPA, was not available until after six months of employment, and was contingent upon approval. (Def.'s Mem. Supp. Mot. Summ. J. (DMSJ) at 2; PRSMF ¶ 48.)

As evidence showing that the life insurance coverage Howard offered did not contain these conditions, Mrs. Woods offers the following statements Woods made to her after his interview with Howard:

> [T]hey offered me the job and the benefits are [sic] they pay eighty-five percent of a family policy for health insurance, I would pay fifteen, and they offer life insurance of triple your salary, and paid vacation one week in the first year – or for the first year with incremental increases in that [sic] with longevity, and that there were paid holidays and he didn't know just which ones.

(PRSMF ¶ 46.)

She adds that when she asked Woods what he had to do to start the benefits, he stated that they began with employment. (Id. ¶ 48.) She contends that Woods either was not informed or did not mention to her that he had to be approved for coverage and that the plan was limited to a specific provider.[2] (Id. ¶¶ l5, 48.)

From this statement made to her, Mrs. Woods asserts that a "jury could find that Mr. Woods' understanding that the life insurance benefit would be equal to three times his salary is ...believable, since it was the standard term offered [to] all full time employees, and [is] included in every written understanding of the employment terms at Berry, Fowles & Co. after November 1998." (Pl.'s Resp. Def.'s Mot. Summ. J. (PRMSJ) at 17.) She relies on Paquin's testimony regarding letters of understanding he wrote for defendant to potential employees regarding their compensation and benefits package. However, as these letters were written three months after Woods was hired (DRSMF ¶ 45), and Berry, Fowles & Co. did not issue such a letter to Woods, this testimony is not material to determining what Howard offered Woods during his interview. Moreover, although Mrs. Woods asserts that there was no written documentation of the company's "standard" life insurance (PRMSJ at 13), Berry, Fowles & Co. has established that the

[2] Plaintiff lacks personal knowledge to assert that Woods was not informed. Woods' statements regarding the terms of employment Howard offered are hearsay. Although there is extensive argumentation on the issue of whether they should be deemed admissible under a hearsay exception, it is not necessary to make that determination because, as will be discussed, the statements do not support an inference that Woods was offered anything but the AICPA plan.

Administration Manual and the application for coverage state that the life insurance is contingent upon approval of insurability. (DRSMF ¶ 41.)

Assuming arguendo that an inference could be made that during the interview Howard failed to inform Woods that the life insurance was conditioned upon approval by Prudential and that the insurance was limited to one provider, the fact remains that the AICPA plan was the only insurance plan the company ever utilized. Berry, Fowles & Co. has shown that over the span of ten years it only participated in the AICPA plan and had not provided any other life insurance coverage to any of its employees. (DSMF ¶¶ 8, 12; DRSMF ¶ 61.) Mrs. Woods has not offered any evidence that leads to the conclusion that in hiring Woods, Howard deviated from offering the customary life insurance plan through AICPA. See Anderson, 477 U.S. at 252 ("The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to defeat summary judgment].").

Furthermore, when Paquin provided Woods with the AICPA application for coverage, there is no evidence in the record that Woods protested, complained, or remarked about having to fill out the AICPA application for coverage. There is no suggestion that Woods objected to the qualifying language contained in the application, which states that by signing he agrees that "the insurance applied for... shall become effective on the date...established by the policy, provided the evidence of insurability is satisfactory." (DSMF ¶ 28.) Instead, the record merely reflects that Woods completed the application, signed his name and submitted it for approval or denial. In light of these facts, the only possible conclusion is that during the interview, Howard offered Woods the same insurance benefit offered to all full-time employees, a specific life insurance

benefit provided through AICPA requiring approval by Prudential. See Carter v. Amax Coal Corp., 748 F. Supp 812, 815 (D. Utah 1990) (finding that pre-employment promises were not promises for generic benefits because the promises "involved [defendant's] benefit plan to the extent that the plan was the vehicle for such promises to be fulfilled.").

2. Was Alternative Life Insurance Promised?

Mrs. Woods offers three sets of facts as evidence to show that after Woods was denied coverage under the AICPA plan, a promise of alternative coverage was made to him. First, Woods' son, Norman Woods, testified that Woods stated that after he was denied life insurance through AICPA, the office manager at Berry, Fowles & Co. assured him that alternate coverage would be found. (PRSMF ¶ 64.) Woods also stated to Norman Woods that Howard was a good man and would make sure "this was taken care of."[3] (Id.) Second, Mrs. Woods offers Paquin's testimony that he discussed the Prudential denials with management; that he researched alternative coverage; and that he presented an insurance quote to management who, after Woods' death, switched to a different insurance provider. (Id. ¶¶ 55, 56, 58, 59, 61.) Third, she offers Paquin's testimony that during a conversation between defendant's insurance agent and Paquin, Hamilton stated, "there were other ways we could provide that coverage, that the denials were not a problem, and that other arrangements could be made." (Id. ¶ 57.) Although Hamilton's statement to Paquin does not constitute a promise to Woods, this statement

[3] Defendant claims that these statements to Norman Woods are hearsay and should be stricken by the Court. Mrs. Woods argues that the statements are admissible as either a present sense impression or as a reflection of Woods' state of mind. (PRMSJ at 17.) Woods' statement to Norman Woods regarding Paquin's promise is hearsay to the extent it constitutes a statement, by a person other than the declarant, offered for the truth of the matter asserted (i.e. that Paquin made a promise). See Fed. R. Evid. 801. The statements by Woods to Norman Woods to the extent they are offered to prove the existence of a promise by Paquin cannot be considered by the Court for summary judgment purposes. See Fed. R. Evid. 56(e).

and Paquin's research into alternative coverage may be corroborative evidence tending to show that Paquin promised Woods that alternative coverage would be found for him.

However, as both parties agree, Paquin did not have the authority to promise Woods that the company would seek or obtain alternative insurance. (DSMF ¶ 35; PRSMF ¶ 35). See Hinchey v. NYNEX Corp., 144 F.3d 134, 140-141 (1st Cir. 1998) (granting defendant's motion for summary judgment in part because plaintiff produced no evidence tending to show that his supervisor had actual authority to negotiate terms of an employment document, nor was there evidence of apparent authority). Apparent authority "'results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent.'" Id. (quoting Linkage Corp. v. Tr. of Boston Univ., 425 Mass. 1, 16 (1997), cert. denied, 522 U.S. 1015 (1997). Mrs. Woods neither alleges nor provides evidence indicating that Berry, Fowles & Co. held Paquin out as a person who had authority to promise alternative insurance on behalf of the company. Additionally, there is no evidence that the company ratified a promise by Paquin. Paquin denies promising Woods alternative coverage. (DSMF ¶ 34.) No employee denied coverage under the AICPA plan ever obtained alternative life insurance through Berry, Fowles & Co.. (DRSMF ¶ 56.) As Paquin did not have the authority to promise Woods alternative coverage, and Hamilton's statement to Paquin does not constitute a promise to Woods, there is no evidence establishing that Berry, Fowles & Co. promised Woods alternative life insurance after Woods was denied under the AICPA plan.

3. Does ERISA Preempt Plaintiff's State Law Claims?

Mrs. Woods asserts a claim for breach of contract (Count I), negligence (Count II), a third-party beneficiary claim (Count IV), negligent misrepresentation (Count V), and promissory estoppel (Count VI). Defendant's motion for summary judgment asserts that all of these state law claims are preempted by ERISA. (DMSJ at 1, 6.) The ERISA preemption provision, 29 U.S.C. § 1144(a), states: "Except as provided in subsection (b) of this section, the provisions of this subchapter... shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a). ERISA defines "state law" to include all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). The courts have understood this language to encompass state law causes of action. See, e.g., McMahon v. Digital Equipment Corp., 162 F.3d 28, 36 (1st Cir. 1998). A state law cause of action will be preempted by ERISA if two conditions exist: (1) the plan at issue is an 'employee benefit plan' and (2) the cause of action 'relates to' an employee benefit plan. Id. Since the evidence conclusively establishes that the only contract or promise at issue in this case is the AICPA plan, that plan must be examined in light of the two conditions.

A. Is the plan at issue an 'employee benefit plan'?

ERISA defines an employee benefit plan as

> ...any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services...

29 U.S.C. § 1002(1) (emphasis added).

Mrs. Woods concedes that the AICPA plan, in and of itself, is a plan governed by ERISA. (PRSMF ¶ 8) (stating that in her complaint she asserts that "the insurance policy for which Mr. Woods applied and was rejected, was part of an employment welfare plan governed by ERISA"). What she challenges is whether Berry, Fowles & Co. maintained or established an employee welfare benefit plan by participating in the AICPA plan. She asserts that Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987), supports her conclusion that Berry, Fowles & Co. did not establish or maintain the plan under ERISA. (PRMSJ at 5.) The company, on the other hand, argues that the Donovan tests should be applied.[4] (Def.'s Reply Mem. Supp. Mot. Summ. J. (DRMSJ) at 2.) "In Fort Halifax, the Court stated that an employee benefit package is such a 'plan' only if its 'provision by nature requires an ongoing administrative program to meet the employer's obligation.'" Rodowicz v. Mass. Mut. Life Ins. Co., 192 F.3d 162, 170 (1st Cir. 1999) (quoting Fort Halifax, 482 U.S. at 11.) Several circuit courts have read Fort Halifax as "emphasizing the mechanical one-time nature of severance payments" and these courts have "ceased to apply the decision where the... employer promise involved ongoing obligations materially beyond those present in Fort Halifax." Simas v. Quaker Fabric Corp., 6 F.3d 849, 853-54 (1st Cir. 1993). In essence, Fort Halifax provides an initial threshold: if an employer's

[4] The First Circuit applied the tests enumerated in Donovan v. Dillingham, 688 F.2d 1367, 1370-1373 (11th Cir. 1982), in Wickman v. Northwestern Nat'l Life Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990), but has not applied the tests otherwise. Under the first Donovan test, to determine whether a plan is a welfare benefit plan under ERISA, the following five elements must exist: "(1) a plan, fund or program (2) established or maintained (3) by an employer or by an employee organization, or by both (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance benefits (5) to participants or their beneficiaries." Wickman, 908 F.2d at 1082 (citing Donovan, 688 F.2d at 1370). In order to determine whether a plan has been "established, " the Dovovan test inquires whether, from the surrounding circumstances, "a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." Id.

obligations do not go beyond those present in Fort Halifax, the plan is not an ERISA plan. See Belanger v. Wyman-Gordon Co., 71 F.3d 451, 455 (1st Cir. 1995) (citing Simas, 6 F.3d at 853-54). However, beyond this threshold, there is no authoritative checklist to conclusively determine whether a particular plan is an "employee benefit plan" governed by ERISA. Id.

Ultimately, "the question of whether an ERISA plan exists is 'a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." McMahon, 162 F.3d at 36 (citing Wickman v. Northwestern Nat'l Ins. Co., 908 F.3d 1077, 1082 (1st Cir. 1990). The analysis is conducted on a case-by-case basis and involves consideration of the two purposes of ERISA. Belanger, 71 F.3d at 454-55. ERISA's primary goals are to protect employees from abuse and mismanagement of funds and to protect employers' interests by "eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." McMahon, 162 F.3d at 35-36 (quoting Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 99 (1983)). In light of these purposes, the factors to be considered are the "nature and extent of the employer's benefit obligations," Rodowicz, 192 F.3d at 170 (citing Belanger, 71 F.3d at 454), the amount of discretion the employer has in administering the plan, O'Connor v. Commonwealth Gas Co., 251 F.3d 262, 267 (1st Cir. 2001), whether the plan requires an ongoing administrative program, Fort Halifax, 482 U.S. at 11, and the employer's intent, Wickman, 908 F.2d at 1083.

Although no single act by an employer in itself is determinative (Donovan v. Dillingham, 688 F.2d 1367, 1373 (11th Cir. 1982), certain factors are "more indicative of the existence of a plan than others." Belanger, 71 F.3d at 455. For example, in cases

where an employer has purchased insurance, the "crucial factor" is "whether the purchase constituted an expressed intention by the employer to provide benefits on a regular and long term basis." New England Mut. Life Ins. Co. v. Baig, 166 F.3d 1, 7 (1st Cir. 1999) (citing Wickman, 908 F.2d at 1083). Additionally, "the purchase of a group policy... covering a class of employees offers substantial evidence that the plan has been established." Wickman, 908 F.2d at 1083 (citing Donovan, 688 F.2d at 1373).[5]

Berry, Fowles & Co. has shown that it participated in a group life insurance policy, the AICPA plan, and that it had administrative obligations under the plan. (DSMF ¶¶ 9, 13, 19-23). Under the AICPA plan, its responsibilities included assisting employees complete applications, preparing reports, calculating premium payments and paying premiums in full. (Id. ¶¶ 8, 19.) Mrs. Woods does not disagree with this description of duties under the AICPA plan. (PRMSJ at 7.) Instead, she characterizes these functions as "minimal administrative duties" and directs attention to the fact that Berry, Fowles & Co. does not process claims payments or participate in coverage decisions. (PRMSJ at 7.) She concludes that this life insurance plan, like a plan involving a one-time lump sum payment, is not governed by ERISA because it does not implicate ERISA concerns. (PRMSJ at 7.)

In light of the record and First Circuit precedent, these arguments are not convincing. According to Fort Halifax, an ERISA plan must by nature require "an ongoing administrative program to meet the employer's obligations." Fort Halifax, 482

[5] Had defendant noted that ERISA statements in a Summary Plan Description are a significant indicator that an ERISA plan exists, defendant might have included in its statement of facts a reference to the Summary Plan Description where the ERISA statements appear. See McMahon, 162 F.3d at 11. However, as the statement of material facts does not mention these ERISA statements, the court has no independent duty to consider this part of the record. See D. Me. Loc. R. 56(e).

U.S. at 11. The AICPA plan requires more than a one-time lump sum payment for insurance. This is evidenced in the fact that AICPA issued an Administrative Manual in order to assist Berry, Fowles & Co. in its administration of the plan. (DSMF ¶ 13.) Berry, Fowles & Co. was responsible for preparing reports, calculating its premium payments, paying its premiums, and assisting employees in completing applications. (Id. ¶¶ 6, 18, 19, 23.) Clearly the administrative obligations go beyond the mere one-time lump sum payment in Fort Halifax.

Beyond the Fort Halifax analysis, the facts here indicate that Berry, Fowles & Co. maintained or established the plan with the intention of providing the life insurance plan to its employees on a regular and long term basis. The company offered the insurance to its full-time employees, paid the full premium amount, assigned the administration of the plan to the office manager, and accepted the responsibilities of completing the reports and assisting employees with the applications. (Id. ¶¶ 9, 19, 21.) These responsibilities demonstrate that the AICPA plan required Berry, Fowles & Co. to have an ongoing administrative plan. Moreover, the purchase of a group life insurance (Id. ¶¶ 9, 10), "offers substantial evidence" that the plan is an ERISA plan. See Wickman, 908 F.2d 1083 (citing Donovan, 688 F.2d at 1373.) Based on the foregoing undisputed facts, I can only conclude that as a matter of law the AICPA plan established or maintained by Berry, Fowles & Co. is governed by ERISA.

Mrs. Woods raises the payroll practice exception[6] and notes the decision in McMahon that "where an employer pays occasional, temporary benefits from its general

[6] The payroll practices exception of 29 CFR § 2510.3-1(b) states that the terms "employee welfare benefit plan" and "welfare plan" do not include compensation payments by employers for certain purposes. The exception does not exclude an employer's premium payment for group life insurance.

assets, there is no benefits fund to abuse or mismanage and no special risk of loss or nonpayment of benefits." (PRMSJ at 9 (quoting McMahon, 162 F.3d at 36.)) Berry, Fowles & Co. paid the AICPA premiums from operating funds (i.e. general assets) instead of segregating funds for a welfare benefit plan. (Id. at 8; DRSMF ¶ 45.) ERISA was designed to protect employers from a "patchwork of conflicting state regulatory schemes" and "to safeguard employees from the abuse and mismanagement of funds that have been accumulated to finance employee benefits" (PRMSJ at 9 (citing McMahon, 162 F.3d at 35)). Thus, Mrs. Woods argues that where such funds are not implicated, ERISA does not apply.

The payroll practice exception created in 29 C.F.R. § 2510.3-1(b) applies to occasional, temporary benefits paid from general assets, such as overtime, holiday pay, sick pay, vacation pay, pay during active military duty, training pay, and payments during sabbatical leave. Here, Berry, Fowles & Co.'s premium payments were ongoing, long-term payments and were not payments of compensation for any of the excluded purposes. Thus, the payroll practice exception does not control in this case. See McMahon, 162 F.3d at 37-38 (finding that the payroll practice exceptions in 29 C.F.R.§ 2510.3-1(b) did not apply to defendant because its Salary Continuation Plan was supported by assets outside defendant's operating funds and because the defendant held the plan out as an ERISA plan).

Based on the above stated reasons, the AICPA plan maintained and established by Berry, Fowles & Co. is an employee benefit plan governed by ERISA.

B. Do the state law claims 'relate to' the employee benefit plan?

A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." Ingersoll-Rand v. McClendon, 498 U.S. 133, 139 (1990) (citing Shaw, 463 U.S. 96-97). There are two tests for determining whether a state law cause of action "relates to" an ERISA plan. First, a state law claim is preempted by ERISA where "a plaintiff, in order to prevail, must prove the existence of, or specific terms of, an ERISA plan." McMahon, 162 F.3d at 38 (citing Ingersoll, 498 U.S. at 140). Second, a state law claim is preempted if it "conflicts directly with an ERISA cause of action." Ingersoll, 498 U.S. at 142. If a state law cause of action "relates to" an employee benefit plan in a manner which is "too tenuous, remote, or peripheral;" the state law cause of action will not be preempted. Shaw, 463 U.S. at 100.

Mrs. Woods' state law causes of action are preempted by ERISA under the first test because "plaintiff, in order to prevail, must prove the existence of, or specific terms of, an ERISA plan." See McMahon, 162 F.3d at 38 (citing Ingersoll, 498 U.S. at 140). Her Count I breach of contract, Count IV third-party beneficiary, Count V negligent misrepresentation, and Count VI promissory estoppel are all based on the pre-employment promise of life insurance. As discussed above, the promise for "standard" life insurance necessarily involved the AICPA plan because it was the only vehicle for fulfilling such promises. See Carter, 748 F. Supp. at 815. Mrs. Woods has not provided sufficient evidence to reasonably infer that Woods and Berry, Fowles & Co. made a contract involving a promise for any life insurance outside the AICPA. In light of this conclusion, in order to prevail on these claims Mrs. Woods, must prove terms of the AICPA plan. Count I, Count IV, Count V and Count VI therefore "relate to" the ERISA

governed AICPA plan and are preempted by ERISA. See Hampers v. W.R. Grace & Co., 202 F.3d 44, 52 (1st Cir. 2000) (stating that the First Circuit has "consistently held that a cause of action 'relates to' an ERISA plan when a court must evaluate or interpret the terms of the ERISA-regulated plan to determine liability under the state law cause of action.").

Mrs. Woods' complaint does not simply focus on the pre-employment promise of life insurance. Count II asserts that the company "was negligent in a number of ways, including but not limited to, failing to process [Woods'] application, failing to take steps to seek alternative coverage, and otherwise failing to take reasonable steps to obtain the amount of the insurance it had promised [Woods]." (Compl. ¶¶ 13, 14.) To the extent that the negligence claim relies on an alleged promise from Howard for generic insurance or a promise from Paquin for alternative insurance after Woods was denied coverage, the claim fails as discussed above. There is insufficient admissible evidence to support a reasonable inference that such a promise was made. To the extent that the negligence claim relates to the AICPA application or Berry, Fowles & Co.'s failure to perform duties under the plan, this claim raises issues of Berry, Fowles & Co.'s administration of the plan. Thus, in order to prevail, Mrs. Woods must prove the terms of the plan. As Count II specifically pleads negligence regarding the AICPA application, Count II "relates to" the AICPA plan and is therefore preempted by ERISA.

In addition to being preempted under the Ingersoll test, plaintiff's state law claims are preempted under N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995). The Supreme Court stated that where a state law cause of action provides an "alternative enforcement mechanism" to ERISA's

enforcement regime, the action is "related to" an ERISA plan and therefore is preempted. See Hampers, 202 F.3d at 51 (citing Travelers, 514 U.S. at 656). The inquiry involves "look[ing] beyond the face of the complaint and determ[ining] the real nature of the claim...." (Id.) The ERISA claim (Count III) alleges that the AICPA plan was part of an employee welfare benefit plan governed by ERISA, that Berry, Fowles & Co. wrongfully violated the plan by failing to provide the life insurance policy as promised, and that decedent's estate is entitled to enforce decedent's rights under the plan. (Compl. ¶¶ 17, 18.) Similarly, Mrs. Woods' state law claims are based on a promise of life insurance and she seeks to recover the death benefits under the promised insurance. (PRMSJ at 10.) Thus, the underlying theme of her ERISA claim and her state law claims is that Berry, Fowles & Co., through its own conduct, failed to provide or obtain the promised life insurance and, therefore, she is entitled to a death benefit of three times Woods' salary. "[W]hen plaintiff brings a claim under ERISA 'based on precisely the same conduct that underlies his state law [] claim[s], then the state law claims are viewed as alternative mechanism[s] for obtaining ERISA plan benefits' and are thus preempted." Trombley v. New Eng. Tel. & Tel. Co., 89 F. Supp.2d 158, 168 (D.N.H. 2000) (quoting Hampers, 202 F.3d at 51). Accordingly, the state law claims are preempted by ERISA as they are merely alternative mechanisms for obtaining ERISA plan benefits.

Mrs. Woods asserts two additional arguments to prevent preemption of her state law claims. First, she argues that her state law claims are against the company in its individual capacity, not as an ERISA administrator, therefore the claims do not "relate to" ERISA and are not preempted. (PRMSJ at 15.) None of the authorities upon which Mrs. Woods relies involve litigants who have an employee/employer relationship. One

of the cited cases, Stetson v. PFL Ins. Co., 16 F.Supp.2d 28, 29 (D. Me. 1998), involved a state law claim of fraudulent misrepresentation by an insurance salesperson in the context of a situation where there was no ERISA relationship at the time of alleged misrepresentation and the ERISA relationship no longer existed at the time of the lawsuit. In that case, the court found no ERISA preemption because the complaint had nothing to do with an ERISA relationship. By way of contrast, the AICPA plan existed for almost ten years before Woods became an employee, and any negligence or misrepresentation by the company or its agents related directly to that plan. Because Mrs. Woods' state law claims 'relate to' the ERISA plan, they are preempted.

Second, Mrs. Woods claims that because the promise for life insurance was made at a time when Woods was not a participant of an ERISA plan, ERISA does not provide a method to enforce the promise. (PRMSJ at 13.) As support for her argument, Mrs. Woods relies on Neuma, Inc. v. AMP, Inc., 259 F.3d 864 (7th Cir. 2001) where the court, in relevant part, held that a plaintiff was not a participant or a beneficiary to whom the employer owed a fiduciary duty when the misrepresentations were made, thus his claim did not fall within the scope of an ERISA provision that could be enforced under the ERISA civil enforcement provision, 29 U.S.C. § 1132. For this reason, the Seventh Circuit determined that ERISA did not preempt plaintiff's claim of negligent misrepresentation. In this context however, Mrs. Woods' argument is nothing more than another attempt to persuade the court to find that a promise was made for something other than the ERISA plan. As previously discussed, the underlying nature of Mrs. Woods' claim is that the company failed to provide the life insurance promised, i.e. the ERISA governed AICPA plan. Although Woods was not a plan participant at the time of

his death, he was an employee and, as will be discussed in more detail below, an employee may be allowed to have 'participant' status to bring an ERISA enforcement action in certain situations. Thus, the distinction between the present case and Neuma, is that here the plaintiff has a colorable claim that falls within the scope of ERISA. Mrs. Woods' characterization of what would otherwise be an ERISA claim as a state law claim does not affect the preemption power of ERISA. See Hampers, 202 F.3d at 51 ("...we have stated that in order to assess whether the state law cause of action is an alternative enforcement mechanism, we must 'look beyond the fact of the complaint' and determine the real nature of the claim 'regardless of plaintiff's... characterization.'" (citing Danca v. Private Heath Care Sys., Inc., 185 F.3d 1, 5 (1st Cir. 1999)).

4. Is Plaintiff Entitled to Benefits Under the AICPA Plan?

Berry, Fowles & Co. seeks summary judgment on Count III, the ERISA claim, solely on the ground that Mrs. Woods is not entitled to a benefit under the AICPA plan because Woods was denied coverage. Defendant argues that because Woods was never a "participant" under the plan, Mrs. Woods cannot be a beneficiary under the plan.[7] (DMSJ at 18.) The Supreme Court's definition of 'participant' includes employees who do not achieve the actual status of a participant, but who are employees reasonably expected to be in currently covered employment. Firestone Tire & Rubber Co., 489 U.S. at 117; See also Vartanian v. Monsanto Co., 14 F.3d 697, 700-703 (1st Cir. 1994). Several circuits have articulated a clear recognition that an employer who denies an employee "plan participant" status through its own conduct should be barred from using

[7] ERISA defines "beneficiary" as a person "designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." 29 U.S.C. § 1002(b) (emphasis added). Berry, Fowles & Co. concedes that Mrs. Woods is the duly appointed personal representative of Woods' Estate and is his beneficiary and sole heir. (DSMF ¶ 1.)

state law preemption to leave the plaintiff without any remedy. See Vartanian 14 F.3d at 700-703; Adamson v. Armco, Inc., 44 F.3d 650, 654 (8th Cir. 1995)(collecting cases from First, Second, Fifth and Eighth Circuits recognizing the exception to requirement that plaintiff must be a plan participant to bring an ERISA action in those cases where the employer's own conduct deprived the plaintiff of participant status). See also Carlo v. Reed Rolled Thread Die Co., 49 F.3d 790, 795, n. 5 (finding negligent misrepresentation claim preempted and acknowledging that an ERISA claim would not be available (although none was ever pled) but distinguishing Vartanian because the employer's conduct alone caused the plaintiff to fail to achieve participant status at the time of the suit in the latter case).

If Paquin had the responsibility to provide employees with AICPA applications for coverage, and his failure to provide the form to Woods caused a delay in the processing of Woods' application, and that delay resulted in Woods' failure to meet Prudential's coverage requirements, Berry, Fowles & Co. may be liable. Woods did not receive his application from Paquin until September of 1999, six months beyond his eligibility date. From the record, it is not clear whether Woods would have been approved by Prudential had his application been submitted near the completion of his six months continuous service, which would have been the beginning of February of 1999. Furthermore, after one year, in approximately February 2000, before he died, Woods could have resubmitted his application even though it had been initially denied. (PRSMF ¶¶ 30, 53). The significance, if any, of these facts is not directly addressed by the summary judgment record I have before me, but if Mrs. Woods can establish that Berry, Fowles & Co. breached a duty owed to Woods under the plan and that breach prevented

Woods from qualifying as a plan participant, she may be entitled to recover under his ERISA claim. Certainly under First Circuit precedent the employer is not entitled to judgment as a matter of law if its conduct alone prevented Woods from qualifying as a plan participant.

Conclusion

I recommend that the Court **GRANT** defendant's motion for summary judgment as to Counts I, II, IV, V, and VI as preempted by ERISA and **DENY** defendant's motion for summary judgment as to Count III.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

_____
Margaret J. Kravchuk
U.S. Magistrate Judge

Dated this 14 day of December, 2001

TRLIST BANGOR
STNDRD
U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 01-CV-37

WOODS v. BERRY FOWLES & CO Filed: 02/26/01

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 791

Lead Docket: None Jurisdiction: Federal Question

Dkt # in Kennebec Superior : is CV-01-19

Cause: 29:1132 E.R.I.S.A.-Employee Benefits

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